No. 12,074

IN THE

United States Court of Appeals

For the Ninth Circuit

RICE GROWERS ASSOCIATION OF CALIFORNIA (a corporation),

Appellant,

vs.

REDERIAKTIEBOLAGET FRODE (a corporation), Owner of the Steamship "Frej",

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This is an appeal to the United States Court of Appeals for the Ninth Circuit from an order of the District Court of the United States for the Northern District of California, Southern Division, in admiralty, fixing the amount of the limitation of liability fund in a limitation of liability proceeding.

JURISDICTION OF THE DISTRICT COURT AND OF THIS HONORABLE COURT.

This proceeding for exoneration from or limitation of liability was brought by the owner of the SS "Frej", Rederiaktiebolaget Frode (hereinafter referred to as Frode), under the provisions of 46 U.S.C. sections 181-189 inclusive.

The petition of Frode (Apostles on Appeal, page 2) alleges that a fire broke out aboard the SS "Frej" as she was leaving San Francisco, California, on a voyage to Havana, Cuba and that the total claims against her were or might be in excess of her value and the value of her pending freight, at the end of her voyage. The petition prays for exoneration from liability for the consequences of that fire or, in the alternative, for limitation of liability therefor.

Two claims were filed in the Court below, one by appellant Rice Growers Association of California, (hereinafter referred to as Rice Growers), for damage to the cargo aboard the SS "Frej" and the other by salvage claimants who are not parties to this appeal. (See Apostles on Appeal, page 59.) The two claims were in excess of the value of the SS "Frej" and her pending freight.

Pursuant to a stipulation entered into by all the interested parties, the District Court ordered Frode to file an ad interim stipulation in the sum of $290,250.00 (Apostles on Appeal, page 19), which Frode did. (Apostles on Appeal, page 15.)

Instead of having the amount of the limitation fund determined by a Commissioner, the parties sub-

mitted the question to the District Court on an agreed statement of facts, entitled "Stipulation Re Value" (Apostles on Appeal, page 45) on the basis of which the District Court made the order from which this appeal is taken.

The appellate jurisdiction of this Honorable Court rests upon 28 U. S. C., sections 225(a) and 227 (now 28 U. S. C., sections 1291 and 1292).

The order appealed from was held by this Honorable Court to be an appealable interlocutory order "determining the rights and liabilities of the parties" (28 U. S. C., section 227), in *Rice Growers Association of California v. Rederiaktiebolaget Frode* (December 13, 1948), 171 Fed. (2d) 662.

The petition for appeal of Rice Growers and the order allowing the appeal were both filed on August 20, 1948, within 15 days of the entry of the order appealed from in the District Court. (Apostles on Appeal, pages 55 and 56.) On the same date Rice Growers filed its notice of general appeal, which notice had theretofore been served on Frode. (Apostles on Appeal, page 56.)

STATEMENT OF THE CASE.

Rice Growers shipped approximately 5060 tons of rice (a non perishable cargo) aboard the SS "Frej" from San Francisco to Havana. The SS "Frej," owned and operated by Frode, left her San Francisco dock in the evening of May 6, 1947. Within an hour, and while she was still in San Francisco Bay, a fire

broke out in her fire room, which fire was not extinguished until the early morning hours of the next day. The SS "Frej" then returned to her dock at San Francisco where all of the cargo was unloaded. The rice affected and damaged by water, smoke and fire was retained and disposed of in the San Francisco Bay region. The balance (over 3200 tons) was carried to Havana by the SS "Frej."

Frode is a foreign corporation with no offices in the United States of America. It owns only one or two small ships which it operates in Scandinavian waters. Its purchase of the SS "Frej," which was acquired from American owners in Seattle, Washington, in the early part of 1947, was an isolated transaction. When the SS "Frej" left San Francisco for Havana, with the cargo of rice aboard, she was on her way to Sweden with no plans to ever return to this country.

On June 6, 1947, Rice Growers filed a libel in the District Court of the United States for the Northern District of California, Southern Division, for the recovery of damages in the amount of $365,990.00. The SS "Frej" was seized and reduced to the possession of the United States Marshal. She remained in his possession until August 9, 1947, when she was released following the filing by Frode of its petition for limitation of liability and of the ad interim stipulation. The further prosecution of the libel theretofore filed by Rice Growers was enjoined and all proceedings between the parties were thereafter had in the limitation of liability proceeding.

The SS "Frej" was repaired in San Francisco between May 26, 1947 and August 4, 1947. On June 19, 1947, while the work was in progress, Frode gave a notice purporting to abandon the voyage. (Exhibit "B," Apostles on Appeal, page 51.) After completion of the repairs, however, the SS "Frej" carried the sound rice to Havana with no other cargo aboard and with ballast replacing the damaged rice. Discharge at Havana was completed on September 18, 1947. That carriage was made pursuant to an agreement of the parties (Exhibit "C," Apostles on Appeal, page 51) which provided:

"6. The carrying on of the cargo and/or this agreement shall in no way prejudice any right or rights which either party now has and shall not affect the present status quo of the purported abandonment of the voyage at San Francisco, California."

After Frode had given its notice of purported abandonment of the voyage, the libel theretofore filed by Rice Growers was amended to include a second cause of action in which Rice Growers demanded damages in the amount of $95,000.00 to cover the cost of forwarding the sound rice to Cuba. The cost of such forwarding would have approximated that amount, since the SS "Frej," which was a tramp ship with rates cheaper than those of the regular lines, had charged and collected over $100,000.00 as the cost of carrying the entire cargo. That second cause of action was dismissed by Rice Growers without prejudice as part of the agreement heretofore referred to for the carriage of the sound rice to Cuba. It was, of course,

cheaper for Rice Growers to dismiss that second cause of action without prejudice and to pay an additional $10,000.00 for the carriage of the sound rice to Cuba (Apostles on Appeal, page 52), than to pay about $95,000.00 to another ship and then try to collect that amount back from Frode.

For the purpose of the limitation fund the parties have stipulated to the following values for the SS "Frej" and her stores:

Date	Vessel	Stores	Total
(1) Immediately before the fire—(May 6th, 1947)	$255,000	$16,845	$271,845
(2) Immediately following the fire—(May 8th, 1947)	106,000	8,329	114,329
(3) On the day on which Frode gave the notice of abandonment—(June 19th, 1947)	117,000	3,000	120,000
(4) On the day on which the District Court made its order as to the filing by Frode of an ad interim stipulation — (August 4th, 1947)	275,000	21,825	296,825
(5) On the day of the completion of the unloading operations in Cuba—(September 18th, 1947)	275,000	16,005	291,005

The parties have also stipulated as follows to the amount of the aggregate bill of lading charges:

Ocean freight	$ 93,104.00
Havana handling fee	5,060.03
Manifest fee	18.00
Handling chgs. at San Francisco	2,024.01
Wharfage at San Francisco	1,770.99
Total	$101,977.03

Frode contended in the Court below that the limitation fund was to be determined as of May 8th or

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Frode contended in the Court below that the limitation fund was to be determined as of May 8th or

June 19th. Rice Growers contended that the fund was to be determined as of September 18th.

The District Court held that the value of the SS "Frej" and her stores was to be determined as of June 19th, the day on which Frode gave the notice of purported abandonment of the voyage. The District Court also upheld the contention of Frode that the ocean freight alone ($93,104.00) was to be included in the fund and rejected the contention of Rice Growers that the fund should also include, as part of the freight pending, the various handling, manifest and wharfage charges.

SPECIFICATIONS OF ERROR.

Assignments of error 1, 2, 3, 4, 5, 6, 7, 8 and 9 (Apostles on Appeal, pages 57-59) are relied upon by Rice Growers.

ARGUMENT.

(1) SPECIFICATIONS OF ERROR 1, 2, 4, 5, 6, 7 AND 8.

Specifications 1, 2, 4, 5, 6, 7 and 8 will be discussed together because they all relate to the question of whether or not the voyage ended on June 19th.

> "1. The Court erred in holding that June 19th, 1947, is the date as of which the limitation of liability fund is to be fixed.
>
> 2. The Court erred in holding that for the purpose of said limitation of liability fund the value of the Steamship "Frej" was to be fixed at

One Hundred Seventeen Thousand ($117,000.00) Dollars.

4. The Court erred in holding that for the purpose of said limitation of liability fund the value of the stores of the Steamship "Frej" was to be fixed at Three Thousand ($3,000.00.)

5. The Court erred in fixing the total amount of the limitation of liability fund at Two Hundred Thirteen Thousand One Hundred Four ($213,104) Dollars.

6. The Court erred in holding that the voyage of the Steamship "Frej" terminated in San Francisco, California, on June 19th, 1947.

7. The Court erred in holding that Rederiaktiebolaget Frode, a corporation, petitioner and appellee herein, was justified, as owner of the Steamship "Frej" in terminating her voyage in San Francisco, California, on June 19th, 1947.

8. The Court erred in failing to hold that the voyage of the Steamship "Frej" ended in Havana, Cuba, on September 18th, 1947.

(a) The limitation fund is to be determined as of the end of the voyage.

The right of Frode to limit its liability for the damage resulting from the fire is yet to be determined. That right is entirely statutory, and, before the question of whether or not it is entitled to limit its liability can be litigated, Frode must comply with the statutory requirements as to the giving of adequate security to the damage claimants. The pertinent part of the statute (46 U. S. C., section 185) is as follows:

> "The vessel owner, * * * may petition a district court of the United States * * * for limitation of liability * * * and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

Section 185 does not specify *the time* as of which the limitation of liability fund is to be determined. Numerous cases have passed upon that question, however, and it is now settled that the limitation of liability fund is to be determined as of the *end of the voyage.* Since Frode and Rice Growers disagree as to when and where the voyage ended, it will now be necessary to review those cases.

In *Place v. Norwich and New York Transportation Co.,* 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134, the owner of the "City Norwich" sought to limit its liability following a collision in which she sank. The Court held that the *sinking terminated her voyage,*

and that, for limitation of liability purposes, her value was to be taken as she was lying at the bottom of the ocean.

In *Thommessen v. Whitwell,* 118 U. S. 520, 6 S. Ct. 1174, 30 L. ed., 156, the owner of the "Great Western" sought to limit his liability following a collision between the "Great Western" and the "Daphne." The "Great Western" suffered no damage therefrom, but she was later stranded and wrecked, shortly before reaching her destination, from causes unrelated to the collision. The owner of the "Daphne" contended that the value of the "Great Western" immediately after the collision ($150,000.00) should be used for limitation purposes. The Court held, however, that her value should be taken as of the end of her voyage, *that her voyage ended with her sinking,* and that her value as a sunken wreck ($1,800.00) should accordingly be used for limitation purposes.

In *The Lara,* (1946, U. S. District Court for the Southern District of New York) 1947 A. M. C. 27, the facts were such that the rule of the "Great Western" worked for the benefit of the damage claimant instead of the shipowner. The "Lara," while on a voyage from New York to Barranquilla, Colombia was involved in a collision off the coast of North Carolina, and thereafter repaired in Florida. After the completion of the repairs she proceeded on her voyage, and instead of meeting with a further casualty, as the "Great Western" did, she arrived at Barranquilla and completed her voyage. The contention of the damage claimant, which was upheld, was precisely

the contention made by Rice Growers in this case, namely, that the value of the vessel at the end of her voyage should be used, *including the value of her repairs.*

It is thus clear that, in and of itself, the time of the collision, fire or other sea casualty, for which a vessel may incur liability and in which she may herself be damaged, has no bearing upon the time as of which her value is to be taken for limitation of liability purposes. Both the owner of the vessel involved in an accident and the persons to whom he may be liable as a result of that accident *must await the end of her voyage.* The shipowner is required to put up no more than her value at that time, irrespective of her value at the time of her accident, while the damage claimant must run the risk of her burning and sinking (as the "Great Western" sank) during the latter part of her voyage. On the other hand, a vessel may appreciate in value during her voyage, and irrespective of the cause of that appreciation, her owner must take the risk of her being worth more at the end of that voyage (the "Lara") just as the damage claimant takes the risk of her being worth less. The rule works both ways and not just one way as contended by Frode. *As long as the voyage continues,* the shipowner is not entitled to limit his liability to the value of his vessel immediately after the accident *or* to her value at the end of her voyage, whichever is less. He is only entitled to limit his liability to her value at the end of her voyage, irrespective of what her value may have been at any time during that voyage.

The question then reduces itself to whether or not the notice of abandonment given by Frode had the effect of legally terminating the voyage of the SS "Frej."

We do not know whether Frode will renew, before this Court, the contention made below that the voyage of the SS "Frej" terminated on May 8th. We must assume that it will rather seek to uphold the decision of the trial judge in view of the fact that, by giving notice of abandonment on June 19th, Frode indicated that it itself did not consider the voyage to have ended before that date. In any event it is clear that, if her voyage was not effectively terminated on June 19th, as we shall now proceed to establish, it was not terminated on May 8th or on any other date prior to the completion of the unloading operations in Cuba.

(b) Under the maritime law, Frode had no right to abandon the voyage.

The applicable law was settled long ago by the United States Supreme Court in the case of *The Maggie Hammond v. Morland,* 9 Wall. 435, 19 L. ed. 772. The "Maggie Hammond" had completed about half of her voyage from Scotland to Montreal, when she was damaged by heavy gales and forced to seek refuge in a Welsh port. She arrived there on September 17th, and, on November 3rd, after repairs had been made, she was certified to be in a "seaworthy state to proceed on her intended voyage." Her master, however, refused to reload the cargo and proceed

to fulfill the contract, alleging that the season was too far advanced. Instead she took on another cargo and sailed for Baltimore. The shipowner forwarded the cargo in another vessel at the end of the following May. Meanwhile a libel had been filed by the cargo owner and the "Maggie Hammond" was seized in Baltimore. In affirming the decree awarding damages to the cargo owner the Supreme Court stated:

> "Grant that the conduct of the master in putting back is without objection, * * * the question then is: whether his subsequent conduct in refusing, after the repairs were finished, to complete the voyage or to procure another vessel, tranship the goods, and send them forward, and in sailing for another and a distant port under a new contract of affreightment, leaving the goods of the libelants in store, without making any provision for their transportation and delivery, constitutes a breach of the contract of affreightment. * * *
>
> As agent of the owners the master is bound to carry the goods to their place of destination in his own ship, unless he is prevented from so doing by the act of God, the public enemy, or by the act of the shipper, or from some one of the perils expressly excepted in the contract of shipment. When the vessel is wrecked, or otherwise disabled in the course of the voyage, and cannot be seasonably repaired to perform the voyage, or cannot be repaired without too great delay and expense, the master is at liberty to tranship the goods and send them forward in another vessel, so as to earn the whole freight, but he is not entitled to recover for freight if he refuses to tranship the goods, unless he repairs his own vessel within a

> reasonable time and carries them on to the place of delivery. * * * (19 L. ed. at p. 780.)
>
> Duties remain to be performed by the master or the owner, after the vessel is disabled. His obligation of safe custody, due transport, and right delivery still continues and is by no means discharged or lessened while it appears that the goods have not perished in the disaster. * * *
>
> Nothing will excuse the carrier under such circumstances but the causes stipulated in the bill of lading, and he is still bound, by virtue of his original contract, to use his utmost exertions to transport or send forward the goods to the port of delivery." (19 L. ed. at p. 781.)

The rule announced in *The Maggie Hammond v. Morland,* supra, is recognized throughout the maritime world. In *Carver* on *Carriage of Goods By Sea* (8th Ed. 1938) the shipowner is said at page 460 to be

> "bound to repair and complete the voyage, unless the damage by excepted perils is such that it would be unreasonable to require him to repair her * * * where the ship owner has in fact repaired the ship at the port of refuge, and might have carried on the cargo in her, his failure to do so is a breach of the contract, whether the repairing could reasonably have been required or not."

The leading British case is that of *Assicurazioni Generali v. SS. Bessie Morris Co.* (1892) 1 Q. B. 571, in which the Court said at pages 576 and 577:

> "The duty of the shipowner is to complete the voyage if he can. If, owing to the perils of the

> seas, he is compelled to put into an intermediate port for repair his duty is to refit and carry on such part of the original cargo as is fit to be carried on. * * * In a case of this description the original voyage is not regarded as broken up into two, viz., first, into one voyage from the port of sailing to the port of refuge, and secondly, into another voyage from such port to the port of destination.
>
> * * * the voyage was not properly determined at Gibraltar (the port of refuge) unless its completion on the original terms was either physically impossible or so clearly unreasonable as to be impossible in a business point of view. * * * *I am not aware of any case which has decided that any expense short of * * * an expense greater than the value of the ship and freight when repaired sufficiently to complete the voyage, would be so clearly unreasonable as to be impossible in a business point of view.*" (italics added.)

The rule that a contract for carriage of goods by sea is not dissolved unless the ship is so injured that the cost of her repairs would exceed her value when repaired also prevails in the United States. See *Ellis v. Atlantic Mut. Ins. Co.,* 108 U.S. 342, 2 S. Ct. 746, 27 L. ed. 747.

In our case, however, none of the grounds upon which a ship owner is justified in abandoning a voyage were present. The "Frej" was not sunk; she was neither a total loss nor a constructive total loss. It was known in advance that the cost of her repairs would not exceed her value when repaired. It was

known in advance that the repairs would not result in unreasonable delay, particularly in view of the fact that the cargo was non-perishable. Four bids were received, (Apostles on Appeal, page 46) under which repairs were to be completed in:

(1) 20 days
(2) 35 days
(3) 40 days
(4) 48 days

On May 23, 1947, Frode accepted the bid calling for 48 days, instead of the bid calling for 20 days, and repairs were actually begun on May 26, 1947. The work had accordingly been in progress for 24 days when Frode sent its notice of purported abandonment. Frode then knew that the repairs would probably be completed in 24 more days and that the SS "Frej" could complete her voyage within a reasonable time. *The best proof that she was able to do so is, of course, the fact that she did complete her voyage.*

(c) The bills of lading gave Frode no greater right to abandon the voyage.

The notice of purported abandonment was given "under authority of applicable bills lading and otherwise." The only clause of the bills of lading which is at all applicable is Clause 4*, which provides as follows:

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*A copy of the complete bill of lading was made an exhibit in the Court below and became a part of the record on appeal by stipulation and order without being printed in the Apostles. The quotation from Clause 4 found in the petition for limitation of liability (Apostles on Appeal, p. 5) is neither complete nor correct.

"In any situation whatsoever and wheresoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the Carrier or the Master is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to or loss of the ship or any part of her cargo, to make it unsafe, imprudent, or unlawful for any reason to commence or proceed on or continue the voyage or to enter or discharge the goods at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual or agreed place of discharge in such port, the Carrier may before loading or before the commencement of the voyage, require the shipper or other person entitled thereto to take delivery of the goods at port of shipment and upon failure to do so, may warehouse the goods at the risk and expense of the goods; or the Carrier or the Master, whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the goods there, may discharge the goods into depot, lazaretto, craft, or other place; or the ship may proceed or return, directly or indirectly, to or stop at any port or place whatsoever as the Master or the Carrier may consider safe or advisable under the circumstances, and discharge the goods, or any part thereof, at any such port or place; or the Carrier or the Master may retain the cargo on board until the return trip or until such time as the Carrier or the Master thinks advisable and discharge the goods at any place whatsoever as herein provided; or the Carrier or the Master

> may discharge and forward the goods by any means, rail, water, land, or air at the risk and expense of the goods. The Carrier or the Master is not required to give notice of discharge of the goods or the forwarding thereof as herein provided. When the goods are discharged from the ship, as herein provided, they shall be at their own risk and expense; such discharge shall constitute complete delivery and performance under this contract and the Carrier shall be freed from any further responsibility. For any services rendered to the goods as hereinabove provided, the Carrier shall be entitled to a reasonable extra compensation."

That clause was twice judicially construed in recent years. In the case of *The Wildwood,* 1943 A.M.C. 320, 133 Fed. (2d) 765, this Honorable Court stated:

> "Such a clause must be given a reasonable interpretation, and the discretion conferred may not be exercised in an arbitrary or unreasonable manner, nor without substantial grounds, nor will good faith alone suffice." (133 F. (2d) at p. 767.)
>
> *"This agreement as to the Carrier's discretion to abandon the voyage gives no more power of abandonment than exists in the absence of clause 4."* 133 F. (2d) at p. 767.) (Italics added.)

Thus, the Carrier can do no more, under Clause 4, than it could have done without that clause. In *The Wildwood,* supra, the abandonment was upheld because the wartime dangers to the vessel had become substantially greater during the voyage than anticipated by the parties at the beginning of that voyage. In our case however, there were no dangers involved

in continuing the voyage when, on June 19, 1947, Frode purported to abandon the voyage.

The same clause again came before this Honorable Court in the case of *The Absaroka,* 1947 A.M.C. 325, 159 F. (2d) 134. The rule announced in the case of *The Wildwood,* supra, was restated and this Honorable Court held that the abandonment of the voyage found "justification in the increased likelihood of submarine attack" (159 F. (2d) at p. 137), and that "the effect of the torpedoing of the vessel was such as 'may cause' a decision that it was 'unsafe or impracticable to proceed * * *' * * * by reason of the presence of a war hazard greater than what was anticipated. * * *" (159 F. (2d) at p. 135.)

The abandonment was also held to have been justified on the ground that the war would unreasonably delay repairs to the ship. In that connection this Honorable Court stated: "While under ordinary conditions the time for the Absaroka's repairs would take about 45 days, it was a rational anticipation of the appellant's manager that without a special government priority the vessel would be 'likely' not to be repaired for months." (159 F. (2d) at p. 136.) In our case, however, there was no danger of seizure, no danger of submarine attack, no uncertainty as to when the repairs would be completed; in fact none of the conditions which might have justified Frode in abandoning the voyage were present on June 19, 1947, when the notice was given.

Under the test of reasonableness announced in *The Wildwood,* supra, and *The Absaroka,* supra, Frode

had no choice but to complete the voyage of the S. S. "Frej."

To summarize: The voyage of a vessel may be abandoned only if:

(1) The vessel becomes a total loss, or

(2) The vessel becomes a constructive total loss, or

(3) The voyage is frustrated as it was in the case of *The Wildwood* and of *The Absaroka.*

None of these contingencies occurred in this case and the values for limitation purposes should accordingly be taken as of September 18, 1947, the date of the completion of the voyage in Cuba.

(d) Since Frode had no right to abandon the voyage in San Francisco, the purported abandonment was an unlawful act which cannot fix the date as of which the limitation fund is to be determined.

A limitation of liability proceeding is "equitable in its nature." *Hartford Accident & Indemnity Co. v. Southern Pacific Co.,* 273 U. S. 207, 47 S. Ct. 357, 71 L. ed. 612; *Rice Growers v. Rederiaktiebolaget Frode,* 171 Fed. (2d) 662.

The use of equitable powers in a limitation proceeding is shown by *The Salvore* (C.C.A. 2, 1929), 1930 A.M.C. 23, 36 F. (2d) 712. Before the filing of a petition for limitation of liability by the owner of the "Salvore," a libel *in personam* had been filed by a cargo owner, and a ship other than the "Salvore" had been seized under a writ of foreign attachment. The shipowner thereafter sued the cargo owner in Italy

in continuing the voyage when, on June 19, 1947, Frode purported to abandon the voyage.

The same clause again came before this Honorable Court in the case of *The Absaroka,* 1947 A.M.C. 325, 159 F. (2d) 134. The rule announced in the case of *The Wildwood,* supra, was restated and this Honorable Court held that the abandonment of the voyage found "justification in the increased likelihood of submarine attack" (159 F. (2d) at p. 137), and that "the effect of the torpedoing of the vessel was such as 'may cause' a decision that it was 'unsafe or impracticable to proceed * * *' * * * by reason of the presence of a war hazard greater than what was anticipated. * * *" (159 F. (2d) at p. 135.)

The abandonment was also held to have been justified on the ground that the war would unreasonably delay repairs to the ship. In that connection this Honorable Court stated: "While under ordinary conditions the time for the Absaroka's repairs would take about 45 days, it was a rational anticipation of the appellant's manager that without a special government priority the vessel would be 'likely' not to be repaired for months." (159 F. (2d) at p. 136.) In our case, however, there was no danger of seizure, no danger of submarine attack, no uncertainty as to when the repairs would be completed; in fact none of the conditions which might have justified Frode in abandoning the voyage were present on June 19, 1947, when the notice was given.

Under the test of reasonableness announced in *The Wildwood,* supra, and *The Absaroka,* supra, Frode

had no choice but to complete the voyage of the S. S. "Frej."

To summarize: The voyage of a vessel may be abandoned only if:

(1) The vessel becomes a total loss, or

(2) The vessel becomes a constructive total loss, or

(3) The voyage is frustrated as it was in the case of *The Wildwood* and of *The Absaroka.*

None of these contingencies occurred in this case and the values for limitation purposes should accordingly be taken as of September 18, 1947, the date of the completion of the voyage in Cuba.

(d) Since Frode had no right to abandon the voyage in San Francisco, the purported abandonment was an unlawful act which cannot fix the date as of which the limitation fund is to be determined.

A limitation of liability proceeding is "equitable in its nature." *Hartford Accident & Indemnity Co. v. Southern Pacific Co.,* 273 U. S. 207, 47 S. Ct. 357, 71 L. ed. 612; *Rice Growers v. Rederiaktiebolaget Frode,* 171 Fed. (2d) 662.

The use of equitable powers in a limitation proceeding is shown by *The Salvore* (C.C.A. 2, 1929), 1930 A.M.C. 23, 36 F. (2d) 712. Before the filing of a petition for limitation of liability by the owner of the "Salvore," a libel *in personam* had been filed by a cargo owner, and a ship other than the "Salvore" had been seized under a writ of foreign attachment. The shipowner thereafter sued the cargo owner in Italy

for unlawful attachment and then petitioned for limitation of liability in New York, where the original libel had been filed, and obtained an injunction. The cargo owner moved that the shipowner be required to dismiss the Italian action, or in the alternative, that the injunction in the limitation proceeding be dissolved.

The Circuit Court of Appeals ordered the District Court to dissolve the injunction, unless the shipowner stayed the trial of the Italian action until the determination of the cargo owner's claim.

The Court stated:

> "The limitation proceeding was an appeal to a court of admiralty, which is a court of equity, invoking the aid of the court, and the appellee, seeking equity, should willingly do equity * * *" (36 F. (2d) at 713.)
>
> "The court below having obtained prior jurisdiction of the parties, and the appellee having sought that same jurisdiction in its limitation proceedings, unquestionably gave the court the power to deal with the appellee before it as equity and justice required." (36 F. (2d) at p. 714.)

Thus, the Court imposed upon the party seeking the benefit of the limitation of liability statute the equitable condition that that party do equity before he could receive equity.

It must be remembered that this limitation of liability proceeding was initiated by Frode, not by Rice Growers, and that Frode is the party who seeks equitable relief. This Honorable Court should accordingly inquire, and the trial Court should have in-

quired, whether the conduct of Frode is such as to entitle it to the aid of a Court.

Frode abandoned the voyage without justification. Its only purpose was to be able to carry another cargo and thereby pocket $200,000 instead of the $100,000 which it had already received from Rice Growers for the same voyage.

Thus Frode comes before this Honorable Court, having deliberately breached its contract, and asks that it be allowed to take advantage of that deliberate wrong. As a court of equity, this Honorable Court should either deny Frode the right to invoke the limitation of liability statute and the benefits attached thereto or allow Frode to seek limitation *only* upon the condition that Frode do equity by posting a bond based upon the value of the "Frej" at the lawful end of her voyage in Havana.

(2) SPECIFICATION OF ERROR 9.

> "9. Assuming that the Court was justified in fixing the amount of the limitation of liability fund as of a date earlier than the date of the end of the voyage (September 18, 1947), the Court erred in adopting June 19, 1947, as such date, instead of August 4, 1947, the date as of which said Rederiaktiebolaget Frode became entitled to claim the benefits of the limitation of liability statute (46 U.S.C., Sec. 181-195) by posting its ad interim stipulation for value."

We have heretofore established that:

(1) The limitation fund must be determined as of the end of the voyage, and

(2) Short of destination, there can be an end to a voyage only if:

(a) The vessel became a total loss, or

(b) The vessel became a constructive total loss, or

(c) The voyage was frustrated within the meaning of *The Wildwood* and *The Absaroka.*

Our position, throughout this brief, has accordingly been that, short of destination, a shipowner can invoke the limitation statute only in the event that one of the foregoing contingencies occurred, or by posting security based upon values at the end of the voyage.

Should the rule now be announced for the first time, however, that a shipowner *can* invoke the limitation statute and post security based on values short of destination, even though none of the foregoing contingencies occurred, the only possible date as of which the limitation fund can then be fixed is the date as of which the shipowner made his election to invoke the statute. In this case, that date is August 4, 1947, the date on which Frode took the essential and irrevocable step of posting the security required by the statute.

(3) SPECIFICATION OF ERROR 3.

> "3. The Court erred in holding that for the purpose of said limitation of liability fund the value of the pending freight of said Steamship 'Frej' was to be fixed at Ninety-three Thousand One Hundred Four ($93,104.00) Dollars."

Frode must also surrender the freight collected by the SS "Frej" for her voyage to Havana. It is settled that the amount to be surrendered is the gross freight, without deduction for the expenses of earning it. *The Jane Grey,* 99 Fed. 582; *The Steel Inventor,* 1929 A.M.C. 1610, 36 F. (2d) 399; *In re W. E. Hedger Co.,* 1932 A.M.C. 1064, 59 F. (2d) 982.

In *The Jane Grey,* supra, the shipowners squarely presented the question "as to their right to subtract from the freight then pending the amount of their expenditures in sending the vessel on her voyage". (99 Fed. at p. 592.) Among other items, they sought to deduct "money paid to stevedores for stowing the cargo". (99 Fed. at p. 592.)

The Court held that such deduction could not be made and that the "money paid to stevedores for stowing the cargo" was a part of the pending freight for limitation of liability purposes. The Court emphasized that, if those handling charges were not surrendered, the shipowners

> "might with equal propriety subtract all their other expenses connected with the purchase and fitting out of the vessel, and commissions paid to soliciting agents for inducing passengers to purchase tickets. * * * they might as well include the value of the sails, rigging, anchors, cable, and hull of the ship. * * * The owner is required to suffer the entire loss of all that he has invested in the ship and on account of the voyage, and all that he has received for freight and passage money, * * *". (99 Fed. at p. 592.)

It is clear, therefore, that in this case the limitation fund must include not only the amount designated in the "Stipulation Re Value" as "ocean freight" ($93,-104.00), but also the amounts paid to stevedores both in San Francisco and in Havana and designated as "Handling Chgs. at San Francisco" ($2,024.01) and "Havana Handling Fee" ($5,060.03). It is also clear that the amounts designated in the "Stipulation Re Value" as "Manifest Fee" ($18.00) and "Wharfage at San Francisco" ($1,770.99) are to be considered as expenses of earning the freight and accordingly are also to be included in the limitation fund.

To summarize: Rice Growers paid to Frode a total of $101,977.03 as the cost of carrying the rice to Cuba. That amount, and not $93,104.00, represents the earnings of Frode for the voyage from San Francisco to Havana, the amount which Frode is required to surrender as part of the limitation fund.

CONCLUSION.

The limitation of liability fund should accordingly be fixed as of September 18, 1947, at Havana, and should include the following:

(1) The value of the SS "Frej" at the end of her voyage (Havana) . . $275,000.00
(2) The value of her stores at the end of her voyage (Havana) 16,005.00
(3) The freight for her voyage 101,977.03

or a total of $392,982.03

Frode should now be required to post a bond in that amount.

Dated, San Francisco, California,
March 2, 1949.

Respectfully submitted,
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